

STATE OF MICHIGAN

IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.

Supreme Court No. 129134  
Court of Appeals: 251110

Plaintiffs-Appellees

LOWER COURT NO. 01-007289-NH  
(Shiawassee County Circuit Court)

vs.

THE MEMORIAL HOSPITAL, a Michigan  
Non-Profit Corporation d/b/a  
MEMORIAL HEALTHCARE CENTER

Defendant,  
and

and RUSSELL H. TOBE, D.O., JAMES H.  
DEERING, D.O., and JAMES DEERING, D.O.,  
P.C., d/b/a SHIWASSEE RADIOLOGY  
CONSULTANTS, P.C., Jointly  
and Severally.

Defendants-Appellants

**DEFENDANT MEMORIAL HOSPITAL'S BRIEF IN SUPPORT OF  
DEFENDANT-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

**PROOF OF SERVICE**

Respectfully submitted

CLINE, CLINE, GRIFFIN

Attorneys for Defendant Memorial Healthcare  
Glenn M. Simmington (P33626)  
Jose T. Brown (P33926)  
503 S. Saginaw Street  
Suite 1000  
Flint, Michigan 48502

**FILED**

AUG 15 2005

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I. THIS COURT SHOULD REVERSE IN PART THE COURT OF APPEALS DECISION IN APSEY II BECAUSE THE APSEY II COURT LACKED THE AUTHORITY TO ISSUE A PURELY PROSPECTIVE ADVISORY OPINION, BECAUSE THERE WAS NO LEGAL BASIS FOR PROSPECTIVE APPLICATION WHEN NO AUTHORITY EXISTED SUPPORTING APPELLEE'S POSITION AND WHEN THE DECISION BOUND ALL SUBSEQUENT LITIGANTS, AND BECAUSE THE COURT OF APPEALS WAS POWERLESS TO ACT ON A CASE THAT HAD NEVER BEEN "COMMENCED." .....	5
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CUNE, CUNE & GRIFFIN, PROFESSIONAL CORPORATION, ATTORNEYS AT LAW, 1000 MOTT FOUNDATION BLDG., 503 S. SAGINAW STREET, FLINT, MICHIGAN 48502 (810) 232-3141

## INDEX OF AUTHORITIES

### Cases:

Defendant Memorial Hospital gives notice of its reliance upon the cited cases in the Index of Authorities section of Defendants-Appellants' Application for Leave to Appeal.

### Statutes and Court Rules:

Defendant Memorial Hospital gives notice of its reliance upon the cited statutes and court rules contained in Defendants-Appellants' Application for Leave to Appeal.

Defendant Memorial Hospital cites as an additional authority MCR 7.302(B)(3) 4

### Other

Defendant Memorial Hospital gives notice of its reliance upon the additional authorities cited in Defendants-Appellants' Application for Leave to Appeal.

## STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant Memorial Hospital is in full agreement with the Statement of Order Appealed From, and fully concurs with the Request for Relief, set forth in Defendants-Appellants' Application for Leave to Appeal. Defendant Memorial Hospital was at all times a Defendant-Appellee in the Court below, and a full participant in the appellate proceedings leading up to the issuance, by the Court of Appeals, of Apsey v. Memorial Hospital (On Reconsideration), \_\_\_\_ Mich App. \_\_\_\_; \_\_\_\_ NW2d \_\_\_\_ (2005), (Exhibit A), and Apsey v. Memorial Hospital, \_\_\_\_ Mich App. \_\_\_\_; NW2d \_\_\_\_ (2005), (Exhibit B).

As such, Defendant Memorial Hospital files the instant brief in support of the Application for Leave to Appeal filed by Defendants-Appellants Russell H. Tobe, D.O., James H. Deering, D.O., and James H. Deering, D.O., P.C., d/b/a Shiawassee Radiological Consultants, P.C., and respectfully requests that, to the same extent as this Honorable Court may see fit to grant any of the relief sought by those Defendants-Appellants, the Court will extend identical and co-extensive relief to Defendant Memorial Hospital.

**STATEMENT OF QUESTION INVOLVED**

- I. SHOULD THIS COURT REVERSE IN PART IN THE COURT OF APPEALS DECISION IN APSEY II BECAUSE THE APSEY II COURT LACKED THE AUTHORITY TO ISSUE A PURELY PROSPECTIVE ADVISORY OPINION, BECAUSE THERE WAS NO LEGAL BASIS FOR PROSPECTIVE APPLICATION WHEN NO AUTHORITY EXISTED SUPPORTING APPELLEES' POSITION AND WHEN THE DECISION BOUND ALL SUBSEQUENT LITIGANTS, AND BECAUSE THE COURT OF APPEALS WAS POWERLESS TO ACT ON A CASE THAT HAD NEVER BEEN "COMMENCED?"**

Appellees would answer "No."

Appellants answer "Yes."

Defendant Memorial Hospital answer "Yes."

## STATEMENT OF FACTS & PROCEEDINGS

Defendant Memorial Hospital agrees with the Statement of Facts and Proceedings set forth in Defendants-Appellants' Application for Leave to Appeal, including the statement that Defendants-Appellants are now seeking reversal of the Apsey II Court's decision regarding the application of its own holding, either by peremptory means or through leave to appeal, a statement with which Defendant Memorial Hospital specifically concurs.

CLINE, CLINE & GRIFFIN, PROFESSIONAL CORPORATION, ATTORNEYS AT LAW, 1000 MOTT FOUNDATION BLDG., 503 S. SAGINAW STREET, FLINT, MICHIGAN 48502 (810) 232-3141

## **GROUND S FOR GRANTING LEAVE TO APPEAL**

Defendant Memorial Hospital also agrees with the Grounds for Granting Leave to Appeal set forth in Defendants-Appellants' Application for Leave to Appeal, and gives notice of its reliance upon the authorities cited, and arguments made, in that section of Defendants-Appellants' Application. Based upon those authorities and arguments, as well as upon the circumstances detailed in Defendants-Appellants' Statement of Facts and Proceedings, it is beyond dispute that Defendants-Appellants' Application for Leave to Appeal explicitly shows that "the issue [raised] involves legal principles of major significance to this state's jurisprudence, " as that phrase is used in MCR 7.302(B)(3).

## ARGUMENT I

- I. **THIS COURT SHOULD REVERSE IN PART THE COURT OF APPEALS DECISION IN APSEY II BECAUSE THE APSEY II COURT LACKED THE AUTHORITY TO ISSUE A PURELY PROSPECTIVE ADVISORY OPINION, BECAUSE THERE WAS NO LEGAL BASIS FOR PROSPECTIVE APPLICATION WHEN NO AUTHORITY EXISTED SUPPORTING APPELLEE'S POSITION AND WHEN THE DECISION BOUND ALL SUBSEQUENT LITIGANTS, AND BECAUSE THE COURT OF APPEALS WAS POWERLESS TO ACT ON A CASE THAT HAD NEVER BEEN "COMMENCED."**

Defendant Memorial Hospital agrees entirely with the various arguments set forth in Defendants-Appellants' Application for Leave to Appeal, including those set forth in support of the appropriate Standard of Review before this Honorable Court, and gives Notice of its reliance upon the legal authorities cited in support of those various arguments.



## CONCLUSION

Defendant Memorial Hospital also agrees entirely with the summary of arguments set forth in the "Conclusion" section of the Defendants-Appellants' Application for Leave to Appeal, and gives notice of its reliance upon the legal authorities cited in support of those arguments.

CLINE, CLINE & GRIFFIN, PROFESSIONAL CORPORATION, ATTORNEYS AT LAW, 1000 MOTT FOUNDATION BLDG., 503 S. SAGINAW STREET, FLINT, MICHIGAN 48502 (810) 232-3141

## RELIEF REQUESTED

Defendant Memorial Hospital, at all times a fully participating Defendant-Appellee in the Court below, hereby respectfully requests that this Honorable Court will acknowledge the instant brief in support of Defendants-Appellants' Application for Leave to Appeal, and specifically requests that, to the same extent as this Honorable Court may see fit to grant any of the relief sought by those Defendants-Appellants, the Court will extend identical and co-extensive relief to Defendant Memorial Hospital.

CLINE, CLINE, GRIFFIN

BY



Glenn M. Simmington (P33626)  
Jose T. Brown (P33926)  
Attorney for Memorial Hospital  
503 S. Saginaw Street  
Suite 1000  
Flint, Michigan 48502

Dated:

8/12/05